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No. 06-6407

Supreme Court, U.S.
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In The

Supreme Court of the United States

SCOTT LOUIS PANETTI,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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I. THE STATE COURT'S COMPETENCY DETERMINATION IS NOT ENTITLED TO DEFERENCE UNDER AEDPA, BECAUSE IT INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW AND WAS REACHED THROUGH PROCEDURES HELD UNCONSTITUTIONAL IN *FORD*.

The state trial court's decision that Petitioner Scott Louis Panetti is competent to be executed is entitled to no deference under AEDPA. The State's arguments to the contrary are wrong for two reasons. First, the state court's determination involved an unreasonable application of clearly established federal law – specifically, this Court's procedural due process ruling in *Ford v. Wainwright*, 477 U.S. 399 (1986). Second, AEDPA cannot plausibly be read to require federal courts to defer to state court factual findings made through a process that this Court has held is inconsistent with the minimum constitutional requirements for a fair hearing.

A. A state court decision that departs markedly from this Court's established procedures for adjudicating a federal claim is entitled to no deference.

AEDPA is explicit that state court rulings do not bind the federal judiciary when they involve "an unreasonable application" of this Court's settled constitutional law. 28 U.S.C. § 2254(d)(1). In this case, *Ford* is the source of that settled law. Justice Powell spelled out the minimum due process requirements for a competency determination in his concurring opinion. *See Marks v. United States*, 430

U.S. 188, 193 (1977).[1] Although articulated in the specific context of the Florida competency scheme before the Court, *Ford* clearly establishes the constitutional inadequacy of the procedure used to find Mr. Panetti competent.

Justice Powell succinctly reasoned that, because Florida's process did not "provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination," Alvin Ford's competency "was not adjudicated fairly within the meaning of due process." *Ford*, 477 U.S. at 427. He explained this conclusion in terms equally applicable here:

> [T]he determination of petitioner's sanity appears to have been made ***solely*** on the basis of the examinations performed by state-appointed psychiatrists. Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations. It does not, therefore, comport with due process.

Id. at 424 (emphasis in original).

In Mr. Panetti's case, the trial court denied his counsel the opportunity to respond to the court's experts with expert psychiatric evidence that explained the inadequacies of their evaluation and refuted their results. Mr. Panetti's counsel had supported his request for a competency determination under Article 46.05 by presenting a report from Dr. Mark Cunningham, JA 108-10, a forensic psychologist who agreed *pro bono* to interview Mr. Panetti two days before his scheduled execution in 2004. Dr.

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[1] Justice Marshall's plurality opinion in *Ford* would have required still more extensive procedures for a competency determination. *See* 477 U.S. at 410-18.

Cunningham's report formed a part of counsel's initial submission that resulted in a stay of execution and the state court's appointment of two mental health experts. JA 59. However, the state court denied counsel's request for funds for a more extensive evaluation of Mr. Panetti, *see* JA 96-97, and the court made its determination of competency solely on the basis of the joint written report of its two examiners. The finding of competency was based largely, if not entirely, on the experts' belief that Mr. Panetti was malingering. They characterized his behavior as obstructionist when he would not answer their questions, because they refused to tell him whether they were Christians. JA 71-72; *see* JA 70, 75 (describing Mr. Panetti as "filibustering about the Bible and the Lord," and concluding that he "consciously chose not to answer our interview questions" but rather "deliberately and persistently chose to control and manipulate our interview situation," and "chose not to discuss the reason he is to be executed").

This interpretation of Mr. Panetti's behavior introduced a new and decisive element into the evaluation. Therefore, it was imperative that Mr. Panetti's counsel have a meaningful opportunity to criticize and contest that opinion through "contrary medical evidence." *Ford*, 477 U.S. at 424. Although counsel did submit objections to the experts' report, JA 79-95, he "d[id] not possess any expertise in the field of mental illness," JA 79, and was therefore "at a severe disadvantage in reviewing the adequacy and reliability of the procedures used and the conclusions reached by the court-appointed experts." JA 96. Dr. Cunningham's evaluation could not serve to challenge the experts' conclusion that Mr. Panetti was malingering, because Dr. Cunningham had interviewed him months before those experts filed their report. He could not have addressed the issue of whether Mr. Panetti's fixation on the experts' religious beliefs was malingering or a product

of his psychotic delusion that he was being put to death to stop him from preaching the Gospels.[2]

It was crucial that counsel for Mr. Panetti have the opportunity to refute the court's experts by obtaining and presenting "expert psychiatric evidence that may differ from the State's own." *Ford*, 477 U.S. at 427. As the District Court concluded, "it was exactly this ability to present his own evidence and refute the state-appointed psychiatrists' opinions that Panetti was denied." JA 133. The denial was a gross deviation from the due process requirements that *Ford* established for a competency determination and was, therefore, an unreasonable application of *Ford*.[3]

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[2] Forensic mental health experts can use a number of increasingly reliable tests to detect malingering. *See, e.g.*, Richard Rogers & Daniel Shuman, *Conducting Insanity Evaluations* (2000); Richard Rogers, *Clinical Assessment of Malingering and Deception* (2d ed. 1997); John V. Jacobi, *Fakers, Nuts, & Federalism: Common Law in the Shadow of the ADA*, 33 U.C. Davis L. Rev. 95, 122 (1999).

[3] This Court held in *Williams v. Taylor*, 529 U.S. 362 (2000), and *Wiggins v. Smith*, 539 U.S. 510 (2003), that a state court decision involves an unreasonable application of clearly established federal law under Section 2254(d)(1) if it deviates markedly from the procedure established by this Court's precedents for adjudicating the federal claim at issue.

In *Williams*, the Court held that the Virginia Supreme Court's adjudication of an ineffective assistance of counsel claim was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). 529 U.S. at 396-98. The state court had found that defense counsel's failure to discover and present mitigating evidence was not prejudicial under *Strickland*, because the undeveloped evidence merely showed that "numerous people, mostly relatives, thought that [Williams] . . . was nonviolent and could cope very well in a structured environment." *Id.* at 372 (internal quotation marks omitted). This Court held that finding unreasonable under Section 2254(d)(1) "insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Id.* at 397-98; *see id.* at 416 (O'Connor, J., concurring) (agreeing that the

(Continued on following page)

B. AEDPA cannot sensibly be read to require federal courts to defer to state court factual findings made through procedures that violate the minimum due process requirements established by *Ford*.

Settled principles of statutory construction preclude an interpretation of AEDPA that would require a federal court to defer to competency findings made in state court proceedings that flouted *Ford*'s procedural due process holding. Because *Ford* defined the minimally acceptable procedures for a constitutional competency determination, a construction of AEDPA that compels federal courts to accept factual findings made in violation of those procedures would raise serious constitutional questions. Such an interpretation would breach a cardinal rule of statutory construction.

Virginia Supreme Court's decision involved an unreasonable application of clearly established federal law because it revealed "an obvious failure to consider the totality of the omitted mitigating evidence"). In short, the state court's failure to follow the procedure that this Court had prescribed for the prejudice inquiry made the state court's adjudication of the ineffective assistance claim objectively unreasonable.

Similarly, in *Wiggins*, the Court held that the decision of the Maryland Court of Appeals was an unreasonable application of clearly established federal law because the Maryland court had failed to conduct the searching factual inquiry required by *Strickland*. 539 U.S. at 528. The state court did not assess whether the trial lawyers demonstrated reasonable professional judgment in deciding to end their mitigation investigation after obtaining Wiggins's presentence investigation report and childhood social services records. *Id.* at 527. Instead, the state court "merely assumed that the investigation was adequate." *Id.* After conducting the examination of the records that the state court should have performed, this Court found that trial counsel "chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28. Consequently, the Maryland court's "assumption that the investigation was adequate . . . reflected an unreasonable application of *Strickland*." *Id.* at 528.

"[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," the Court will adopt the constitutional construction, *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407-08 (1909), "unless [it] is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). In passing AEDPA, Congress intended to "give effect to state convictions to the extent possible under law." *Williams*, 529 U.S. at 404 (internal quotation marks omitted). Congress presumably expected state courts to make their findings through procedures that complied with the law of the Due Process Clause.[4] *Ford* plainly held that one-sided competency proceedings that provide no effective opportunity for the prisoner's counsel to challenge the decisionmaker's experts with contrary mental health evidence violate due process. Congress cannot plausibly be supposed to have intended federal courts to defer to findings of fact made in such proceedings.

II. THE STATE MISREPRESENTS MR. PANETTI'S PROPOSED STANDARD OF COMPETENCY AS BASED ON THE CONDEMNED'S SUBJECTIVE, WILLFUL BELIEFS ABOUT THE REASON FOR HIS EXECUTION RATHER THAN ON HIS COGNITIVE CAPACITY.

By repeatedly mischaracterizing the standard of competency invoked by Mr. Panetti, the State attempts to seed the fear that "vast numbers" of death row inmates will manipulate the standard and postpone their executions. Respondent's Brief at 41. The State describes the

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[4] Congress doubtless understood that a state court's disregard of clearly established procedural due process requirements would trigger the exception to deference spelled out in Section 2254(d)(1).

proposed standard as one based on "will" rather than "capacity," and thus makes it appear to be ripe for abuse: "[A]ny execution-competence standard *not* phrased in terms of capacity would be readily susceptible to circumvention by lies or noncooperation." *Id.* at 42 (emphasis in original). Contrary to the State's assertions, Mr. Panetti has consistently argued for a standard that forbids the execution of "a person who, because of a severe mental impairment, is *incapable* of rationally understanding the reason for his execution." Petitioner's Brief at 30 (emphasis added).[5]

Mr. Panetti's standard is not keyed to the "innermost thoughts of capital convicts," so as to provide them with a "remarkably easy" way to "feign [their] way out of a death sentence," nor does it "prevent the execution of convicts who genuinely lack moral qualms about their crimes." Respondent's Brief at 46. The test that Mr. Panetti urges involves three distinct inquiries into the prisoner's mental functioning:

1. Does the inmate have an irrational belief about the reason for his execution?
2. If so, does the inmate suffer from a mental illness or mental impairment?

[5] The State also contends that an execution competency standard containing a rational understanding component is unnecessary, because a condemned inmate, unlike a capital defendant, has "no significant strategic choices" left to make. Respondent's Brief at 38. This may be so, but it misses the main thrust of the *Ford* Court's reasoning in constitutionalizing the common-law ban: that the rule against executing incompetent persons is designed not only to protect them from a punishment whose significance they cannot comprehend, but also to "protect the dignity of society itself from the barbarity of exacting mindless vengeance." *Ford*, 477 U.S. at 410.

3. If so, does the mental illness or mental impairment render him incapable of rationally understanding the connection between his crime and his punishment?

The State erroneously argues that the proposed test for competency involves only the first step. However, the first step simply puts counsel on notice that additional inquiry is necessary if the inmate's stated reason for his execution is not sufficiently grounded in reality.[6] The second step demands a finding of mental illness or impairment, and the third step requires that the inmate's mental illness or impairment be the cause of his inability to rationally understand his predicament. An inmate who is not mentally ill but only manipulative will falter on step two. An inmate who is mentally ill, but whose illness is not the source of his irrational beliefs, will falter on step three. A schizophrenic inmate who suffers from a psychotic delusion that he is receiving secret-coded radio messages about world events from the president will falter on step one. Not all delusions are the same; not all schizophrenics are incompetent to be executed. The State's fears are chimerical.

Examining the case of a person who firmly believes he is innocent and is being executed only because he had abysmal representation should eliminate doubts about the ability of this standard to weed out frivolous claims. Such a person could possibly be diagnosed as having Antisocial Personality Disorder ("ASPD"). The essential feature of

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[6] Courts applying the test announced in *Dusky v. United States*, 362 U.S. 402 (1960), have concluded that "a sufficient contact with reality [is] the touchstone for ascertaining the existence of a rational understanding." *Lafferty v. Cook*, 949 F.2d 1546, 1551 (10th Cir. 1992); *see, e.g., In re Heidnik*, 112 F.3d 105, 112 (3d Cir. 1997) (holding that petitioner was incompetent to waive collateral review, because his decision to give up his appeals "is based on his delusional perception of reality – and has no rational basis").

ASPD is "a pervasive pattern of disregard for, and violation of, the rights of others." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 701 (4th ed. text rev. 2000). One of the main features of ASPD is "lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another." *Id.* at 706. Unlike schizophrenia, not a single feature of ASPD involves delusions or other symptoms indicating profound distortions in thought or perception. *See id.* Lacking the kind of cognitive deficits that constitute the diagnostic criteria for schizophrenia, a person with ASPD would have no basis for claiming any *inability* to rationally perceive the connection between his crime and his punishment. In any event, such a person would ordinarily fail to meet step one of the proposed test, let alone steps two and three.[7]

The State also expresses concern about the inherent uncertainties and risks that *Ford* claims generally entail – that they are subject to conflicting diagnoses, mutable over time, and given to subjectivity. Respondent's Brief at 34. This concern is unwarranted in light of the procedures

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[7] The courts, with the assistance of mental health experts, should be able to distinguish between a psychotic delusion and a belief that is simply incorrect but not necessarily irrational. *See, e.g., Weeks v. Jones*, 52 F.3d 1559, 1571 (11th Cir. 1995) ("[T]he opinion expressed by experts – that the delusions associated with race evidence the Defendant's delusional understanding of the nature of his execution and death – will not stand close scrutiny. The majority of persons on death row, in fact, are Black; and there are many persons who correctly or incorrectly believe that racial persecution is associated with the death penalty. For the Defendant to make such an assertion, although this Court does not find such an assertion to be factually well-founded, is not so highly irregular and inappropriate as to cause his understanding of his pending execution to be attributable to delusion."); *Schornhorst v. Anderson*, 77 F. Supp. 2d 944, 954-55 (S.D. Ind. 1999) (finding that petitioner's belief that his attorneys, the judge, and others had lied, and that his sentence was unfair did not undermine his sanity or even constitute a threshold showing of incompetence).

that the Court has suggested States may adopt "to control the number of nonmeritorious or repetitive claims of insanity." *Ford*, 477 U.S. at 417 (plurality opinion). The States may demand a "high threshold showing" of incompetency before requiring more elaborate procedures. *Id.* at 416-17 (plurality); *see id.* at 426 (Powell, J., concurring) (suggesting that the states "may require a substantial threshold showing of insanity merely to trigger the hearing process"). Texas's execution competency statute has adopted this suggestion. *See* Tex. Code Crim. Proc. art. 46.05(f) (requiring prisoner to make "a substantial showing of incompetency" before the trial court must appoint mental health experts). Even after the required showing has been made, Texas places the burden of persuasion upon the prisoner to show by a preponderance of the evidence that he is incompetent. Tex. Code Crim. Proc. art. 46.05(k). Texas deals with the potential problem of repetitive claims by requiring the prisoner to show "a substantial change in circumstances" after a previous finding of competency. Tex. Code Crim. Proc. art. 46.05(e). With provisions like these in place, the State's professed worries are unfounded.

III. THE FACT THAT THE COMMON-LAW PRECEDENTS DO NOT PRECISELY DEFINE THE STANDARD FOR COMPETENCY TO BE EXECUTED DOES NOT MEAN THAT THE ANCESTRAL LEGACY OFFERS NO INSIGHT INTO THE PROPER EIGHTH AMENDMENT STANDARD.

The State argues that "the historical prong of the Eighth Amendment inquiry is ultimately unhelpful," Respondent's Brief at 21, because the common-law courts "could not avail themselves of the sophisticated and intricate diagnostic tools and categories developed by modern psychiatry." *Id.* at 23 (internal quotation marks *omitted); see id. at 24 ("The vague formulations employed*

by eighteenth-century courts, lacking a clear taxonomy and uninformed by expert analysis, do not translate to *any* of the specific competence standards known to modern jurisprudence.") (emphasis in original). This contention is far too quick in dismissing the reasons our Anglo-American ancestors believed that the incompetent should not be executed. As the *Ford* Court recognized, the traditional common-law justifications still have relevance today and assist in giving definition to the Cruel and Unusual Punishments Clause. Although modern science has deepened our understanding of the nature, etiology, and symptoms of mental illness, we are no more sophisticated than our English forbears in understanding the relationship between desert and punishment or the capacity of the human mind to reach moral judgment. We turn our backs on the received wisdom of the common law at our peril. *See Powell v. Texas*, 392 U.S. 514, 535-36 (1968) (plurality opinion) ("We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds.").

The State confuses the means to be used in deriving a constitutional standard with the methods for determining whether a particular individual meets that standard. The advances of medical knowledge over the centuries do not speak to the first question but only to the second. The appropriate standard for competency to be executed should ensure that the administration of the death penalty conforms to our society's legal and moral traditions. To formulate such a standard, we must take account of the purposes and limits of the law of crime and punishment and of the moral and utilitarian conceptions that inform the criminal law. Because these are moral constructs, not scientific ones, their understanding cannot be delegated to psychiatrists. On these matters, the eminent jurists and judges and moral philosophers of the seventeenth and eighteenth centuries were no less sophisticated than we

are today. We still rely on Coke and Blackstone for their propositions, insights, and understandings in scores of fields of law, including the criminal law.

In concluding that the Eighth Amendment imposes a ban on executing the incompetent, the *Ford* Court explicitly relied on the concerns that the English common-law jurists expressed about the impropriety of executing an offender who was not capable of comprehending the reason for his suffering. 477 U.S. at 406-10. The Court examined these ancient sources and found that many of their insights continued to have contemporary validity. *See id.* at 408-09 ("This ancestral legacy has not outlived its time."). In devising his test for execution competency, Justice Powell looked to "our common-law heritage" and found that its conceptions about cruelty and the lack of retributive value in executing the incompetent are not obsolete. *Id.* at 419 (Powell, J., concurring). His willingness to dispense with one of the common law's concerns emphasizes that he examined each of the others with care.[8] He found that "[t]he more general concern of the common law – that executions of the insane are simply cruel – retains its vitality;" that "[i]t is as true today as when Coke lived that most men and women value the opportunity to prepare, mentally and spiritually, for their death;" and that "today as at common law, one of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose." *Id.* at 421. Plainly, a majority of the Court in *Ford* did not share Texas's disdain for history.

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[8] Justice Powell concluded that the justification for "the prohibition against executing the insane" advanced by "some [common-law] authorities" – "as a way of preserving the defendant's ability to make arguments on his own behalf" – "has slight merit today" in the light of modern legal, not medical, practice. *Id.* at 420-21.

The evolution of medical knowledge is doubtless relevant in answering the question whether a specific individual meets the constitutional test of competency to be executed. Diagnostic techniques that did not exist at common law can assist psychiatrists and psychologists in detecting mental illness and determining the effects of the illness on an individual's mental functioning. Mental health professionals are more skilled than were our ancestors at making these diagnostic judgments. But that should only serve to give us confidence that we can more reliably determine which condemned inmates today meet a standard for competency that is consistent with our historic traditions. It provides no reason to sweep those traditions into the fire.

IV. RETRIBUTION MUST FOCUS ON THE OFFENDER'S MENTAL CAPACITY AT THE TIME OF PUNISHMENT.

A. Retribution demands that the offender suffer.

Mr. Panetti's opening brief observed that the community's need for retribution can be satisfied only if the condemned inmate suffers in anticipation of his approaching execution and rationally understands that he is being made to suffer for his capital crime. Petitioner's Brief at 44-47. Both the State and its *amicus curiae*, the Criminal Justice Legal Foundation ("CJLF"), take issue with this observation. They argue that the primary focus of retribution is society, not the offender, and that therefore a proper retributive analysis is not concerned with the offender's mental state at the time of punishment. Respondent's Brief at 43, 45-46; CJLF Brief at 6-10. Their assessment of

retribution's role is incorrect.[9] The deserved suffering of the offender comprises one of the fundamental principles of the retributive theory of punishment and is approved by the very sources CJLF uses to explain its understanding of retribution.

"Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim," *Roper v. Simmons*, 543 U.S. 551, 571 (2005), retribution demands that the offender suffer. Retribution is based on the idea that punishment serves primarily to exact from an offender the amount of suffering deemed proportionate to pay the "debt" owed society:

> The retributive position is an old one, and its content has not changed much over the centuries. It holds, very simply, that man is a responsible moral agent to whom rewards are due when he makes right moral choices and to whom punishment is due when he makes wrong ones. . . .

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[9] CJLF states that it has found "no support for the notion that the perpetrator's mental state at the time of punishment is a major or even significant consideration in the retributive value of punishment." CJLF Brief at 6; *see id.* at 3 ("His guilt of the crime and deservedness of the punishment are sufficient to justify the punishment."). This statement is startling in light of this Court's determination that a perpetrator's inability to understand the retributive impact of his execution comprised one of the primary rationales for the common law's ban on executing the incompetent and one of the main reasons for constitutionalizing the ban. *See Ford*, 477 U.S. at 409. Only with reluctance does CJLF eventually concede that an inmate's mental state at the time of the execution has retributive importance. *See* CJLF Brief at 9 ("This is not to say that mental condition at the time of execution never undermines the retributive interest."). However, such a position, according to CJLF, "could be derived from retributive principles only in the most extreme forms of insanity, not the kind at issue in this case." *Id.* at 6. There is little dispute that Mr. Panetti suffers from either schizophrenia or schizoaffective disorder, both of which are found at the extreme end of the spectrum of mental illnesses.

> There is a perceived sense of fitness in the sight of wrongdoers being made to suffer for their misdeeds. . . . If other benefits are incidentally derived from making the wicked suffer, well and good; but those benefits must not be sought for their own sake. The purpose of punishment is to inflict deserved suffering, and the purpose of the criminal law is to provide an acceptable basis within the social framework for doing so.

Herbert L. Packer, *The Limits of the Criminal Sanction* 9-10 (1968); *see* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 Am. Crim. L. Rev. 1313, 1317 (2000) ("Retribution . . . assumes that the criminal should be hurt, and that the injury caused by the criminal offense calls for a like infliction of injury on the criminal as a moral penalty."); Jeffrie Murphy, *Retribution Reconsidered* 15 (1992) ("Retributive theorists claim that punishment makes sure that wrongdoers suffer in proportion to their moral iniquity and thereby give up any unfair advantage over others their wrongdoing may have won them.") (footnote omitted); C. W. K. Mundle, *Punishment and Desert*, 4 Phil. Q. 216, 221 (1954) (Retribution theorists assert that "the fact that a person has committed a moral offence provides a sufficient reason for his being made to suffer"). Indeed, CJLF itself necessarily acknowledges the centrality of suffering to the retributivist's position: "The basic premise of retribution theory is that 'the return of suffering for moral evil voluntarily done, is itself just or morally good.'" CJLF Brief at 6 (quoting H.L.A. Hart, *Punishment and Responsibility* 231 (1968)).[10]

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[10] CJLF's other sources also support Mr. Panetti's view of retribution. Besides Hart, CJLF relies on the writings of Moore, who uses the familiar language of retribution that focuses on the suffering of the offender: "Retributive justice obligates those who have culpably violated their primary duties [of moral responsibility] to suffer for the violation.

(Continued on following page)

B. Retribution demands that the offender have the mental capacity to understand that his suffering is deserved.

The offender's suffering is not alone sufficient to satisfy the retributive aim of punishment. The offender must suffer for the right reason before the community can confidently conclude that he is getting his just deserts for his wrongdoing. This is the reason the offender's mental capacity at the time of punishment is crucial to retribution: The offender must possess the cognitive ability to rationally connect his suffering with his crime. *See* Henry Weihofen, *A Question of Justice: Trial or Execution of an Insane Defendant*, 37 A.B.A. J. 651, 652 (1951) ("If the reason for refusing to execute an insane convict is that 'he who sins must suffer,' then ability to appreciate his impending fate is important, to make sure that he will suffer the torture of realizing what is about to happen to him.").[11] When the condemned does not understand the reason he is being made to suffer the pain of his approaching death and execution, capital punishment ceases to be an expression

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Punishing a wrongdoer by making him suffer can of course be seen as a way of 'making him pay' for his wrong." Michael Moore, *Placing Blame: A General Theory of the Criminal Law* 416 (1997). CJLF also relies on Bradley, who reluctantly concedes that the most appropriate means to restore the societal balance disrupted by crime is through punishment that "may include sensory deprivation, even transient pain, which will likely be experienced by the criminal as 'suffering.'" Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 Harv. J. L. & Pub. Pol'y 19, 23 (2003).

[11] The potential lack of retributory satisfaction may explain why the State would undertake extensive efforts to save the life of a condemned inmate who attempts suicide, so that the execution can proceed as scheduled. *See, e.g.*, Holly Becka, *Suicide Try Won't Scuttle Execution: Hatchet Killer Put on Plane to Huntsville after Judge Rules*, Dallas Morning News, Dec. 9, 1999, at 37A (reporting that judge refused to delay the execution and let the inmate "cheat the hangman").

of society's moral outrage and becomes instead "mindless vengeance." *Ford*, 477 U.S. at 410.

This Court recognized in *Ford* that one of the most compelling explanations for the historical persistence of the ban on executing the incompetent is that the State's retributive purpose must be intelligible to the prisoner. *See id.* at 409 ("For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life."). This ancient rationale may have stemmed from the notion that it was useless and, therefore, cruel to punish a person for whom suffering had no meaning. "[T]he strongest reason for a penalty is that it inflicts suffering upon the punishable person: a reason which is clearly lacking in the case of the insane person." Nigel Walker, *Crime and Insanity in England* 197 (1968) (quoting Diego de Covarrubias (1512-77)) (internal quotation marks and footnote omitted). This statement "seems to imply that the madman is incapable of suffering, perhaps because he is incapable of experiencing apprehension." *Id.*

Retribution is justified in part because it expresses society's belief in the dignity of the offender by treating him as an accountable moral agent and communicating that belief to him through the imposition of punishment. *See* Jeffrie Murphy, *Moral Death: A Kantian Essay on Philosophy* in *Retribution, Justice, and Therapy* 134-35 (1979) ("The right to be punished and regarded as a responsible agent, though sometimes painful when honored, at least leaves one's status as a moral person intact. One here gets what he has a right to in the sense that he deserves it, having brought it on himself by his choices."). Consequently, executing an inmate who does not understand the reason for his suffering subverts the death penalty's retributive force:

> By grounding retribution's worth upon the criminal's awareness of the state's desire to repudiate

> his illegitimate claims, we are also able to give greater currency to the idea that punishment is a communicative practice, not merely an expressive one. Thus, effective communication to the offender is of fundamental importance to the practice of retribution. The practice of retribution would not be intelligible, for example, if the offender could not understand the message that the state was sending.

Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 Vand. L. Rev. 2157, 2195 (2001) (footnotes omitted). In short, the condemned inmate must be able to understand that he is experiencing retribution – that his execution is remuneration to society for the wrongdoing he has committed. An inmate who lacks the ability to rationally perceive this connection is not a "punishable person" for the purpose of retribution.

C. A condemned inmate's ability to prepare for death by attempting to expiate the offense is an important aspect of retributive punishment and depends upon his capacity to rationally understand the reason he is being executed.

When the State punishes an offender, it affirms his moral accountability, because he can make the effort to atone for his wrongdoing by expressing remorse, publicly confessing his crime, apologizing to the victim's family, or seeking forgiveness. *Id.* at 2194. *Ford* recognized the enduring vitality of the common law's insistence that an inmate have the ability to prepare for death before he could be executed. 477 U.S. at 409; *id.* at 421 (Powell, J., concurring). The inmate's ability to expiate the offense serves two important functions. First, it assures the community that the inmate actually realizes that this is his last opportunity to take whatever steps he wishes to

prepare to die. It dispels society's concern that the inmate lacks "comfort of understanding," *id.* at 410, and thus prevents his execution from being "uniquely cruel." *Id.* at 421 (Powell, J., concurring). Second, the expiation stands as an outward manifestation that the retributive goal of capital punishment has been satisfied. By preparing for his death in a manner that society values, the inmate confirms society's judgment that he deserves his suffering.

This concept that "only through suffering can the criminal expiate the offense" fits the retributive theory of punishment. Packer, *supra*, at 38; *see* Charles E. Torcia, *The Purpose of Criminal Law: Retribution* § 2, in *Wharton's Criminal Law* (2006) ("The offender simply deserved to be punished; he was allowed, by suffering punishment, to expiate the sin he has committed.") (footnotes omitted); Geoffrey C. Hazard & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 U.C.L.A. L. Rev. 381, 387 (1962) ("The retributive theory is also stated in another way, namely that the prisoner's death is an expiation for his crime."); *State v. Angelina*, 80 S.E. 141, 141 (W.Va. 1913) (noting that defendant who was found guilty of murder in the first degree was "adjudged to be hung in expiation of the crime").

In sum, Mr. Panetti is not a "punishable person" while he remains incompetent. His awareness of the State's articulated reason for his execution does not transform his irrational understanding into rational appreciation. As his execution approaches, Mr. Panetti will either be incapable of suffering – experiencing no fear of execution because he believes he will die a martyr's death – or he will suffer in anticipation of his death, but for the wrong reason: because "the devil is trying to rub [him] out for preaching the word of Jesus Christ." JA 309. Under neither condition will his execution satisfy the retributive goal of capital punishment.

CONCLUSION

The State's and CJLF's arguments in support of the Fifth Circuit's judgment are without merit. That judgment should be reversed.

Respectfully submitted,

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